

MINUTES
SENATE JUDICIARY & RULES COMMITTEE

DATE: Monday, February 06, 2017

TIME: 1:30 P.M.

PLACE: Room WW54

MEMBERS PRESENT: Chairman Lodge, Vice Chairman Lee, Senators Davis, Hagedorn, Anthon, Agenbroad, Foreman, Burgoyne, and Nye

ABSENT/ EXCUSED: None

NOTE: The sign-in sheet, testimonies and other related materials will be retained with the minutes in the committee's office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.

CONVENED: **Chairman Lodge** called the Senate Judiciary and Rules Committee (Committee) to order at 1:31 p.m.

GUBERNATORIAL APPOINTMENT VOTE: **Eric D. Fredericksen, State Appellate Public Defender. Senator Anthon** stated that Eric Fredericksen has been a friend since they were classmates. **Senator Anthon** emphasized that Mr. Fredericksen is well thought of and a good student. He had an ideal upbringing from the Magic Valley. He shows a real dedication to his work and that would make him a great Appellate Public Defender.

Senator Anthon moved to send the gubernatorial appointment of **Eric D. Fredericksen** as State Appellate Public Defender to the floor with recommendation that he be confirmed by the Senate. **Senator Lee** seconded the motion. The motion carried by **voice vote**.

GUBERNATORIAL APPOINTMENT VOTE: **Eric D. Fredericksen, State Public Defense Commission. Senator Anthon** moved to send the gubernatorial appointment of **Eric D. Fredericksen** to the State Public Defense Commission to the floor with recommendation that he be confirmed by the Senate. **Senator Agenbroad** seconded the motion. The motion carried by **voice vote**.

GUBERNATORIAL APPOINTMENT HEARING: **Kimberly Simmons, Sexual Offender Management Board (SOMB). Kimberly Simmons**, Executive Director of the Public Defense System and a member of SOMB, introduced herself stating that she started her career in Idaho in the State Appellate Defender Office, Capitol Litigation Unit, handling death penalty appeals and post-conviction cases. She stated that she gained trial level experience through the Ada County Public Defender's Office handling misdemeanor cases. She spent the last six years handling felony level cases. In 2014 Canyon County opened an Institutional Public Defender Office, where she handled felony cases for about eighteen months. **Ms. Simmons** advised that she is the Vice President of the Idaho Association of Defense Lawyers Board, a member of the National Association of Public Defenders, of SOMB, and of the Pre-Trial Justice Planning Subcommittee.

Ms. Simmons stated that SOMB guidelines have been established for psychosexual evaluators, for treatment providers, and SOMB has provided the certification for the necessary training to meet those guidelines. **Ms. Simmons** said there is also a polygrapher on SOMB.

Senator Lee had a question regarding the need for diversity on SOMB.

Ms. Simmons said diversity is an important issue as not all offenders are the same, nor do they have the same background. She emphasized that it is important to have an understanding of the background of defendants so they can receive appropriate treatment. **Ms. Simmons** asserted that SOMB should have diversity in their backgrounds as well, and her role is to make sure defendants are receiving due process as they go through the system. **Ms. Simmons** explained there is also a voice of the prosecutor, those who treat both adult and juvenile sexual offenders, which would provide an informed picture for treatment and evaluation.

Senator Burgoyne asked if the knowledge we have regarding sexual offenders and how to deal with them is changing, and if we are making progress with this process. **Ms. Simmons** responded she thought progress was being made. A lot of the standards and guidelines use evidence-based practices much like they have in other states and systems. Dr. Bumbey, a member of SOMB and an expert in the area, had helped form some of those standards and guidelines which have been proven to work in the past. **Ms. Simmons** explained that these offenders go to treatment and then integrate back into the community. She indicated that SOMB continues to focus on reducing recidivism. In 2009 tiered registration of sexual offenders was implemented. Under this system sexual offenders are not treated the same way; treatment is determined by level of risk. This system has been shown to work and is based on evidence from other jurisdictions. The measure of progress needs to be made through further studies. Certification of treatment plans is not done by providers, but they are submitted for review by the Idaho Department of Correction (IDOC) who does this certification. Work is being done on treatment plans and different models to try to find the one that best fits Idaho and its offender population.

Senator Hagedorn had a question regarding tiered registration and how well it has worked. He also wanted to know how long it took, and what challenges were encountered when going through the current population of sexual offenders. **Ms. Simmons** explained that she was not part of the process of repopulating the registration process. SOMB discussed when to bring the bill forward, and to determine what the legislators are looking for that will work for Idaho.

Chairman Lodge stated that the vote for Ms. Simmons confirmation would be on Wednesday February 8, 2017.

**GUBERNATORIAL
APPOINTMENT
HEARING:**

Erwin L. Sonnenberg, Sexual Offender Management Board (SOMB). **Erwin L. Sonnenberg**, informed the Committee he has been coroner for Ada County, was appointed the Chief Deputy Coroner in 1979, and served Ada County for thirty years. **Mr. Sonnenberg** explained that he gained insight on sexual offenders including people who have died from the offense, who have committed suicide, and those who have been accused of a sexual offense, whether falsely accused or not. He stated that this involvement in the investigative process gave him a good idea of what the public was looking for with regards to SOMB. **Mr. Sonnenberg** came to Idaho in 1969, graduated from Northwest Nazarene University, and did a residency in laboratory medicine before starting at the coroner's office. **Mr. Sonnenberg** stated it was an honor to serve on SOMB.

Chairman Lodge stated that SOMB was important for the safety of our citizens and expressed appreciation for all that Mr. Sonnenberg had done. **Senator Lee** extended appreciation to Mr. Sonnenberg for his role on SOMB to help protect public safety and share the human side of individuals who are accused.

Chairman Lodge stated that the vote for Mr. Sonnenberg's confirmation would be on Wednesday February 8, 2017.

**PASSED THE
GAVEL:**

Chairman Lodge passed the gavel to Vice-Chairman Lee.

**DOCKET NO.
61-0101-1601**

Rules Governiong Training Requirements for Defending Attorneys and the Administration of Training Funds. **Kimberly Simmons**, Executive Director Public Defense Commission (PDC), explained that this rule deals with the administration of training funds, guides the PDC, and provides transparency to stakeholders. She reviewed the development of this rule including appropriations and those entities who were trained with these appropriations. She reported that this rule originally was a temporary rule allowing the PDC to administer those funds quickly and they have been doing that since the agency was established in 2014. This rule is now being submitted as a pending rule.

Ms. Simmons stated that those eligible for receiving training funds are defending attorneys, non-attorney staff of defending attorneys, or other persons engaged in work related to the representation of indigent defendants. She pointed out the rule also delineates aspects of maintaining the Public Defense Roster including membership, the process for application of membership, and updating the roster.

The types of training programs provided were identified by **Ms. Simmons** and include training exclusive for defending attorneys or public defenders, training held in conjunction with other organizations, and limited enrollment or specialized training. She indicated that from the appropriated funds, scholarships are awarded to send defending attorneys to nationally recognized training programs.

Senator Burgoyne noted that he has received over a hundred emails regarding the PDC suggesting these rules are inadequate. He asked if this was negotiated rulemaking so anyone could comment on the rules. **Ms. Simmons** replied that the training fund rule was not through the negotiated process. The temporary rule was used to enable the PDC to start using the funds. **Senator Burgoyne** inquired if anyone contacted the PDC with questions or concerns about the rules. **Ms. Simmons** replied that the PDC was not contacted with reference to the training rules. The rules were submitted for comment, but no comments were received on this docket.

Chairman Lodge asked how scholarships for non-attorney applicants would be used. **Ms. Simmons** responded they would be used for mitigation specialists and investigators who may work in the pubic defender's office or who may be contracted for mitigation and investigation. **Chairman Lodge** requested specification of qualifications for these positions. **Ms. Simmons** answered that for investigators the qualifications depend on the individual offices. For mitigation specialists the requirements are usually a social work background and experience in the justice system.

Senator Davis referred to the fiscal impact and temporary rules justification. He stated his understanding was that this was originally a temporary rule because funds had been appropriated, were available, and the PDC wanted to make a distribution of funds. **Ms. Simmons** replied that his understanding was correct. **Senator Davis** then noted that the word "person" was not defined, but under statute the word could also mean a partnership or an association. He asked if "person" meant an individual or as otherwise statutorily defined. **Ms. Simmons** advised that it was meant to be an individual. **Senator Davis** requested that in the future, when a change is made, this item be corrected.

Senator Davis asked what happens when the interest level in a particular training program becomes so strong that there are not enough funds to cover all applicants. **Ms. Simmons** commented that there is not a proration or apportionment. She indicated there is consideration being given to this issue. **Senator Davis** referred to factors considered in selecting individuals for training. He asked how time of service is applied, whether the shorter amount of time or the longer amount of time would be the determining factor. **Ms. Simmons** pointed out that this would depend on the training program. Some training programs cover basic fundamentals, therefore the shorter amount of time would be the determining factor. Other programs extend the skills to a more advanced level, making the longer period of time more applicable. **Senator Davis** observed that "time of service" might be better left undefined. He asked how the PDC would deal with someone who applied but was not selected for the program. **Ms. Simmons** replied that has never happened, but an individual could challenge the decision. She stated that unless the program was filled, they would probably admit the individual.

MOTION:

Senator Burgoyne moved to approve **Docket No. 61-0101-1601**. **Senator Anthon** seconded the motion. The motion carried by **voice vote**.

**DOCKET NO.
61-0107-1601**

Rules Governing Standards for Defending Attorneys that Utilize Idaho's Principles of an Indigent Defense Delivery System. **Kimberly Simmons**, Executive Director Public Defense Commission (PDC), reported that this rule has gone through the negotiated rulemaking process. She shared with the Committee two documents:

1. Idaho's Principles of an Indigent Defense Delivery System, Idaho Code § 19-850(a)(vii) (attachment 1),
2. Standards for Defending Attorneys (attachment 2)

Ms. Simmons explained the background of this rule including what was promulgated, why it was promulgated, and why it is important that this pass this year. Promulgating rules that are relevant for Idaho, ensuring ample input from stakeholders and considering the diversity of resources and practices throughout Idaho, is a time-consuming process if done thoughtfully and with integrity. Considering the time needed, it was decided to address only the Standards for Defending Attorneys this year (attachment 2). **Ms. Simmons** detailed the process followed to promulgate these rules. Areas considered included definitions and standards for "case," for "case load", and how they apply to an amended determination of offense and the number of attorneys involved in a case. These rules will clarify those issues. **Ms. Simmons** indicated that other areas addressed in these rules are application of established standards, i.e. to whom the standards apply.

Senator Davis mentioned that he had received emails indicating concerns about items that were not included in these rules. Those who corresponded wanted more specifics. Some standards which had been included previously have been withdrawn. He asked why that section had been eliminated. **Ms. Simmons** stated that the PDC initially put in the national standards recommended by the American Bar Association (ABA). These standards were established in the 1970's, but they had no foundation of studies or research data. During the negotiated rulemaking process the PDC suggested possible use of these standards, immediately receiving serious opposition because the standards had no supporting data. Most of those in opposition stated they understood there would be an Idaho study before standards were put into place. **Ms. Simmons** advised the Committee that an Idaho study is now in the planning stage. **Senator Davis** summarized **Ms. Simmons** comments as the PDC took out the national standards now, but that

doesn't mean there will not be any case load standards to replace them. The situation is that we do not yet know what needs to be adopted that will be the best for Idaho, but the PDC is working to find what those standards should be. Once they are identified, the rules will be amended and will be brought before the Legislature for consideration. **Ms. Simmons** concurred with Senator Davis' assessment of the situation.

Senator Davis asked why the Standards for Defending Attorneys (attachment 2) were not put in administrative code. **Ms. Simmons** replied that this document will continue to grow as there are ten sections for which to promulgate rules. She reiterated that the PDC intends to do one section annually. **Senator Davis** felt the Committee should defer to Ms. Simmons judgement for a year to ascertain the effectiveness of this process.

Senator Hagedorn inquired if the definition of "case" in Idaho would agree with the standards which have been removed. **Ms. Simmons** commented that she is unaware of a national definition for "case." She noted that if it is in the literature, she has not seen it.

Vice Chairman Lee asked what feedback was given to the PDC regarding the "case" definition. **Ms. Simmons** explained that there was confusion about the term's application. She observed that the original definition came from the Idaho Supreme Court and was directed toward accounting of dispositions of cases, but the PDC focuses on workloads of attorneys. **Vice Chairman Lee** went on to ask what the counties' response was to the definition of "case." She stated that the definition of "case" is an integral part of identifying an attorney's workload. **Ms. Simmons** replied that there were questions which were answered satisfactorily, but there was no opposition.

Senator Nye indicated that the rule incorporates the principles (attachment 1). He reported that the feedback he received was concerned with the lack of specificity. The principles all state what should happen. He asked if the PDC reviewed these principles to make them more definite. **Ms. Simmons** commented that the principles are actually taken from the statute. In the Standards for Defending Attorneys (attachment 2) those principles are included but with more detail. **Senator Nye** cited the statute requiring the PDC make recommendations to the Legislature for legislation on the Public Defense System. He asked if tightening up the language for the principles had been considered. **Ms. Simmons** replied that they did not consider that. She assured the Committee that the PDC would address that issue.

Vice Chairman Lee asked where a public defender would find these standards. She also expressed concern for small counties who have difficulty finding attorneys to take specialized cases. Some attorneys have been willing to take the cases, but **Vice Chairman Lee** stated a fear that having to obtain more continuing legal education hours (CLE) might dissuade attorneys from taking the cases. **Ms. Simmons** stated the standards are on the PDC website, and a packet for defending attorneys is being produced that will include the standards. **Ms. Simmons** addressed the concern with the CLE hours for specialized cases pointing out that an attorney could consult with another attorney who has experience in the specialized area. Two years is allowed for completing the training, and the PDC would provide the training.

Senator Burgoyne asked if the PDC heard from the people who are sending mass emails to the Senators. **Ms. Simmons** answered that recently she has not heard from those people. She commented that in October when the announcement for public hearing was published there were some emails, but there was confusion in trying to communicate with the senders. **Senator Burgoyne** inquired how **Ms. Simmons** addressed those emails with regard to the rulemaking. **Ms. Simmons** felt all concerns have been addressed. She emphasized that there has been some distress with the lack of case load standards, but those are coming. She pointed out that if this rule should be rejected based on those specific concerns, not only would the case load standards be eliminated, the guidance language regarding extensive parts of the public defense process would also be gone.

TESTIMONY:

Teresa Baker, Association of Counties (AOC), stated that the AOC supports the rules. **Ms. Baker** affirmed that the AOC heard concerns from the counties, most of which centered on the lack of case load standards. She reported that AOC members attended the sessions around the State. She declared that the PDC listened to their concerns and removed the case load standards, allowing a work load study to be conducted prior to establishing the standards for the State of Idaho.

TESTIMONY:

Kathy Greismier, American Civil Liberties Union (ACLU), stated that the ACLU asks that the rules, specifically the section in reference to the standards for defending attorneys, be rejected because they do not improve public defense system here in Idaho. **Ms. Greismier** explained that the ACLU was involved in the negotiated rulemaking throughout the summer, participating in meetings and offering input. Some input was used. She stated that the ACLU was supportive of the interim case load standards that were included. **Ms. Greismier** indicated that although the ACLU recognized these were national standards, they felt it was appropriate to maintain those standards until the Idaho study could be conducted. She remarked that keeping these standards would limit the number of cases an attorney could take, thus providing good defense for the client. She indicated that the ACLU also wanted to address all ten standards in one year, and to tighten up the language.

Senator Davis asked if **Ms. Greismier** is opposed to the rules as written or because something important is missing. **Ms. Greismier** replied that the ACLU is not opposed to the entire rule, only to the section referencing the document incorporated by reference to standards for defending attorneys (attachment 2). **Senator Davis** inquired why the ACLU would want to reject all the good work that has been done because it is not good enough. **Ms. Greismier** expressed that the ACLU is thankful to the PDC for making the achieved progress. She did not feel, considering the time it has taken to achieve the current status, that a little longer would not be problematic.

Senator Burgoyne asked how rejecting this rule would reduce the time to reach the goal. **Ms. Greismier** reiterated that the ACLU does not see these rules materially improving the working lives of public defenders nor their clients. She pointed out that next year it has to be addressed again, and changes then may make a difference. **Senator Burgoyne** pointed out if these rules are rejected, there will be nothing. **Ms. Greismier** repeated that this proposed rule does not improve the situation for public defenders.

MOTION:

Senator Hagedorn moved to approve **Docket No. 61-0107-1601**. **Senator Foreman** seconded the motion. The motion carried by **voice vote**.

**PASSED THE
GAVEL:**

Vice Chairman Lee passed the gavel back to Chairman Lodge

- S 1023** **Relating to Funeral Processions.** Due to lack of time, hearing of this bill was postponed to the call of the Chair.
- S 1024** **Relating to the Child Protective Act.** Due to lack of time, hearing of this bill was postponed to the call of the Chair.
- S 1025** **Relating to Administrative Judges.** Due to lack of time, hearing of this bill was postponed to the call of the Chair.
- S 1026** **Relating to Criminal Procedure.** Due to lack of time, hearing of this bill was postponed to the call of the Chair.
- ADJOURNED:** There being no further business at this time, **Chairman Lodge** adjourned the meeting at 3:00 p.m.

Senator Lodge
Chair

Carol Cornwall
Secretary

Katy Miller
Assistant Secretary